# EXHIBIT 3

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# UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

### SAN JOSE DIVISION

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|---|---|
| REVEAL CHAT HOLDCO LLC, a Delaware limited liability company, USA TECHNOLOGY AND MANAGEMENT SERVICES, INC. (d/b/a Lenddo USA), a Delaware corporation, CIR.CL, INC., a dissolved Delaware corporation, and BEEHIVE BIOMETRIC, INC., a dissolved Delaware corporation, <br><br> Plaintiffs, <br><br> v. <br><br> FACEBOOK, INC., Delaware corporation, <br><br> Defendant. | Case No. 5:20-cv-00363-BLF <br><br> ***SHERMAN* PLAINTIFFS' OPPOSITION TO DEFENDANT FACEBOOK, INC.'S MOTION FOR ADMINISTRATIVE RELIEF TO CONSIDER WHETHER CASES SHOULD BE RELATED PURSUANT TO CIVIL L.R. 3-12** |

Case No. 5:20-cv-00363-BLF

*SHERMAN* PLAINTIFFS' OPPOSITION TO DEFENDANT FACEBOOK, INC.'S MOTION FOR
ADMINISTRATIVE RELIEF TO CONSIDER WHETHER CASES SHOULD BE RELATED
PURSUANT TO CIVIL L.R. 3-12

I.     **INTRODUCTION**

Facebook, Inc.'s ("Facebook") Motion for Administrative Relief to Consider Whether Cases Should be Related Pursuant to Civil L.R. 3-12 (the "Motion") is a faulty attempt to tie actions together using the broadest of antitrust generalities and cherry-picked facts. Facebook has failed to demonstrate any basis whatsoever to relate *Sherman v. Facebook, Inc.,* No. 3:20-cv-08721-LB (N.D. Cal.) to *Reveal Chat Holdco LLC et al, v. Facebook, Inc.*, No. 5-20-cv-00363 BLF (N.D. Cal.) (*Reveal Chat* and *Sherman* are referred to herein as the "Cases").  The Cases involve entirely *different* classes of plaintiffs, legal theories, transactions, market definitions, business considerations, business units within Facebook, economic realities, and historical conduct. *See* Civil Local Rule 3-12. Plaintiffs Vickie Sherman and Lezah Neville-Marrs ("User Plaintiffs"), the Facebook users who allege they received low quality social networking services in exchange for troves of data, and Plaintiffs Katherine Loopers and Jarred Johnson ("Advertiser Plaintiffs), advertisers who allege they paid supra-competitive prices for low quality digital display advertising services, are in no way related to the app developer competitors of Facebook in *Reveal Chat* who claim harm based on *exclusion from* the "Social Data Market" and "Social Advertising Market." *Sherman*, No. 3:20-cv-08721-LB (N.D. Cal. Dec. 9, 2020), ECF No. 1 (the "*Sherman* Complaint"); *Reveal Chat*, No. 20-cv-00363-BLF (N.D. Cal. Aug. 7 2020), ECF No. 62 (the "*Reveal Chat* Complaint"). Given these significant differences, the Cases do not "concern substantially the same parties, property, transaction or event" and litigating the Cases in front of separate judges would not lead to unduly burdensome duplication of labor or conflicting results. Civil Local Rule 3-12. Accordingly, the *Sherman* Plaintiffs respectfully request the Motion be denied.

II.    **FACEBOOK FAILS TO ESTABLISH THAT *SHERMAN* AND *REVEAL CHAT* ARE RELATED UNDER LOCAL RULE 3-12**

Facebook fails to meet its burden to show that *Sherman* and *Reveal Chat* should be related. "[A]n action is related to another when: (1) The actions concern substantially the same parties, property, transaction or event; *and* (2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges." N.D. Cal. L.R. 3-12(a) (emphasis added). The burden is on the party seeking relation to show that *both* of these requirements are met. *ESS Tech., Inc. v. PC-Tel, Inc.*, No. 01-cv-01300-VRW, 2001 WL 1891713, at *3 (N.D. Cal. Nov. 28, 2001). Because neither (let

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1   alone both) of these elements is present, Facebook's motion should be denied.

2           **A.      The Cases Involve Entirely Different Plaintiffs, Classes, and Markets**

3           The Motion should be denied because the Cases involve different parties  bringing different claims

4   on behalf of different classes during different time periods. *See City of San Jose v. Office of the Comm'r*

5   *of Baseball*, No. 13-cv-2787-RMW (N.D. Cal. March 2, 2015), Dkt. No. 69 at 2 (denying motion to relate

6   because, in part, cases involved different plaintiffs). First, the *Sherman* plaintiffs are consumers and

7   advertisers representing putative classes of **Facebook users** and **purchasers of Facebook's advertising**

8   **services**. *Sherman* asserts claims on behalf of persons and entities "***who maintained a Facebook profile***

9   ***at any point from 2007***" through the present.  *Sherman* at ¶ 181. In contrast, the *Reveal Chat* plaintiffs are

10  corporate entities representing a putative class of **app developers** and competitors of Facebook that seek

11  to "produce[] apps that consume social data, harvest social data, and/or monetize social data." *Reveal Chat*,

12  Dkt. 62 at ¶¶ 18–65, 334.[1] *Reveal Chat* asserts claims on behalf of "persons, entities, corporations in the

13  United States ***who were excluded from the Social Data Market or injured by Facebook's decision to***

14  ***withdraw the Graph APIs, for the period beginning May 24, 2010 until April 30, 2015***." *Reveal Chat* at

15  ¶ 389. Varying class definitions create meaningful differences that weigh against relation. *See Tecson v.*

16  *Lyft, Inc.*, No. 18-cv-06782-YGR, 2019 WL 1903263, at *3 (N.D. Cal. Apr. 29, 2019) ("[T]he factual

17  inquiries for each putative class would be unique because the class putative members have different

18  relationship with [the defendant].").

19          Second, plaintiffs in these cases allege monopolization of and anticompetitive impact in completely

20  different markets. *DeSoto Cab Co., Inc. v. Uber Techs., Inc.*, No. 16-cv-06385-JSW (N.D. Cal. Jan. 7,

21  2019), Dkt. 76 (denying motion to relate "given the differences between the two cases," including different

22  relevant markets and denying motion to relate despite overlap in Sherman Act claims where the "cases

23  concern different plaintiffs, contain different factual allegations, address dissimilar scopes, and, for the

24  most part, entail different claims").  The *Sherman* plaintiffs are consumers in the Social Media, Social

25  Networking, and Display Advertising markets. *Sherman* at ¶¶ 28, 29, 157, 161-164 (defining the **Social**

26  **Networking Market** as platforms facilitate their users finding, interacting, and networking with other

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[1] The *Sherman* plaintiffs and the *Reveal Chat* plaintiffs are also represented by different counsel.

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1  people they already know online; **the Social Media Market** as platforms allowing users to stream, share,

2  and view content; and the **Digital Display Advertising** Market as the delivery of ads on websites and

3  mobile apps the buying and selling of which involves real-time bidding). In contrast, *Reveal Chat* plaintiffs

4  allege antitrust injury as competitors in the Social Data and Social Advertising markets. *Reveal Chat* at ¶¶

5  7, 315-347 (defining a Social Data Market as participants acquiring data from their users and the Social

6  Advertising Market as social media networks selling advertising space on their websites).

7  **B.    The Cases Involve Entirely Different Anticompetitive Conduct During Different
       Time Periods, Aimed at Different Market Participants, Resulting in Different**

8  **Injuries to Unrelated Plaintiffs and Classes**

9      The gravamen of *Sherman* is that, beginning in 2007 and continuing through 2020, Facebook

10  deployed misleading and fraudulent behavior regarding its data collection efforts so that it could amass

11  market share. *Sherman* at ¶¶ 56-62, 78-100. Facebook concedes as much in its motion, Motion at 4, that

12  these theories appear nowhere in *Reveal Chat*[2], which is based on Facebook's conduct between 2012 and

13  2015. *Reveal Chat* at ¶ 6. These differences are significant and preclude relation.  See *Hill v. Goodfellow*

14  *Top Grade*, 2019WL 2716487, at *1 (N.D. Cal. June 28, 2019) (denying motion to relate because,

15  although the cases concerned overlapping events and witnesses, "do not concern substantially the same

16  parties, property, transaction, or event.").

17      Facebook's motion therefore grossly mischaracterizes *Sherman* as "focusing" on Facebook's

18  acquisitions of Instagram and Whatsapp, restricting API access to developers, and use of Onavo to

19  surveil competitors. Motion at 1. As to acquisitions, Facebook's citation to a few common facts does not

20  come close to illustrating substantial overlap. Motion at 2. Any case describing Facebook's acquisition

21  history would include these facts, but such facts are insufficient to relate the Cases. As this Court has

22  recognized, that two cases reference some similar facts is deficient where "there are myriad case-specific

23  facts and issues that do not overlap." *ASUS Computer Int'l v. Interdigital, Inc.,* No. 15-cv-01716-BLF,

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26  [2] The *Sherman* plaintiffs also describe other events and allegations that appear nowhere in the *Reveal Chat*
    plaintiffs' complaint including, inter alia: (1) dark patterns and obfuscations used in Facebook's privacy
    policies; (2) Facebook's deception regarding its "Beacon" program in 2007; (3) Facebook's deception

27  regarding its 2010 introduction of the "Like" Button (4) Facebook's deception regarding psychological

28  manipulation of its users and other cognitive harms; and (5) Facebook's 2020 acquisition of Giphy.
    *Sherman* at ¶¶ 60-61, 65-77, 81-93, 95, 97, 115.

1    2015 WL 13783764, at *1 (N.D. Cal. June 15, 2015) (Freeman, J.). Such is the case here. *See also Adobe*

2    *Sys. Inc. v. A & S Elecs., Inc.*, 2016 WL 9105173, at *3 (N.D. Cal. Oct. 13, 2016) (finding cases not

3    related where different parties, products, and claims were involved).  In identifying only a single case in

4    support of its argument that the Cases concern substantially the same parties, property, transaction or

5    event, Facebook recognizes that the majority of California courts require much more than a mere overlap

6    of certain facts to relate cases. *See Tecson,* 2019 WL 1903263, at *2; *DeSoto Cab*, No. 16-cv-06385-

7    JSW, Dkt. No. 76; *City of San Jose*, No. 13-cv-2787-RMW, Dkt. No. 69, at 2; *Ortiz v. CVS Caremark*

8    *Corp.,* 2013 WL 12175002, at *2 (N.D. Cal. Oct. 15, 2013) (denying motion to relate cases because "the

9    limited overlap of some class members is not enough to reach the 'substantial similarity' threshold.").

10   Indeed, Facebook concedes the Cases differ. Motion at 3.

11          While conveniently overlooking the primary focus of *Sherman*, Facebook fails to address yet

12   another key distinction: *Reveal Chat'*s allegations are narrowly limited to Facebook's conduct *only* as it

13   relates to mobile applications in the mobile environment. Unlike *Reveal Chat*, *Sherman*'s allegations

14   depend upon Facebook's broad collection of data and surveillance across several mediums including *any*

15   means of connection to Facebook's services from desktop to mobile devices, even aggregating user

16   activity across multiple devices. *Sherman* at ¶¶ 88, 152. Not surprisingly, the different plaintiffs assert

17   very different claims and injuries. Th*e Sherman* User and Advertiser plaintiffs respectively allege paying

18   supra-competitive, quality-adjusted, and monetary prices as a result of Facebook's deceptive and

19   anticompetitive conduct. In contrast, the *Reveal Chat* plaintiffs allege they were improperly excluded

20   from accessing consumers' data and competing in the markets for social data and social advertising.[3]

21          Any ostensible overlap between *Reveal Chat* and *Sherman* in advertising markets is a red herring.

22   *Sherman* plaintiffs allege direct, tangible injury in the forms of supra-competitive pricing, lack of

23   transparency, and low quality advertising they purchased. *Sherman* at ¶¶ 74-77 and 116-130. *Reveal Chat*

24   plaintiffs allege indirect relation to advertising, stating that their injury in exclusion from the Social Data

25   Market was the means by which Facebook obtained and maintained its monopoly in Social Advertising.

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     [3] The *Reveal Chat* plaintiffs' alleged injuries conflict with the *Sherman* User plaintiffs' claims, as the

28   *Sherman* plaintiffs wish to maximize their privacy and limit the amount of their personal data amassed by
     online platforms.

4                          Case No. 5:20-cv-00363-BLF

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1    *Reveal Chat* at ¶ 9. *Reveal Chat* does not mention advertising in its class definition or issues common to

2    the class. *Id* at ¶ 478-482. Any advertising harm to *Reveal Chat* plaintiffs is narrowly limited to Facebook

3    denying access to its "NEKO" platform of which *Sherman* makes no mention.  *Id* at ¶¶ 185-187.

4              **C.        Litigating the Cases Separately Will Not Duplicate Labor or Risk Conflicting Results**

5         Facebook similarly fails to show that unduly burdensome duplication of labor or conflicting will

6    result if the Cases are litigated separately. Given the different classes and the different claims based on

7    different markets, there is no overlap of work or risk of conflicting opinions. *Asus Computer I'ntl*, 2015

8    WL 13783764, at *1 (finding "the cases can proceed before different judges without being unduly

9    burdensome because there are myriad case-specific facts and issues that do not overlap, even if the cases

10   both involve similar licensing agreements, and that it is unlikely that there would be conflicting results

11   were the cases to be tried before different judges"). Nor will there be substantial overlap in discovery as

12   the cases involve different theories of liability based on different conduct by Facebook.[4]As explained

13   above, *Sherman*'s theories of liability are entirely distinct from and do not exist in *Reveal Chat*.

14        Facebook's arguments raised against consumers in *Sherman* will not mirror those raised against

15   competitors in *Reveal Chat*. For example, in its motion to dismiss in *Reveal Chat* Facebook argues, *inter*

16   *alia*, that the *Reveal Chat* plaintiffs have not suffered antitrust injury because they do not compete in the

17   *Social Data Market* and because their "purported 'foreclosure' from the [*Social Advertising Market*] as

18   competitors, [ ] is not sufficient to allege an antitrust injury." *Reveal Chat*, No. 5:20-cv-000363-BLF, ECF

19   No. 71. Facebook further argues that it "did not have a duty to deal" with the competitor plaintiffs in *Reveal*

20   *Chat*. *Id.* at 20. These arguments are not relevant in *Sherman* and thus, the Court's findings in *Reveal Chat*

21   will not affect *Sherman*. As such, there is no duplication of effort or risk of conflicting results and relation

22   is inappropriate.  Civil L.R. 3-12.

23   **III.     CONCLUSION**

24        For these reasons, the *Sherman* Plaintiffs respectfully request the Court deny Facebook's Motion.

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26   DATED: December 21, 2020                              Respectfully submitted,

27                                                         /s/ Tina Wolfson

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     [4] To the extent there is any minimal overlap, discovery can be coordinated.

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## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 21, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the Electronic Mail Notice List maintained by the Court, and I hereby certify that I caused the mailing of the foregoing via e-mail and the United States Postal Service to the following non-CM/ECF participants:

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12          Pursuant to L.R. 3-12, I hereby certify that I caused the following document to be lodged with the

13   Chambers of all Judges identified in motion.

14

15   DATED: December 21, 2020                        /s/ *Tina Wolfson*
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